No. 14755

IN THE

UNITED STATES
COURT of APPEALS

FOR THE NINTH CIRCUIT

RECONSTRUCTION FINANCE CORPORATION,
a corporation, *Appellant.*

vs.

SULLIVAN MINING COMPANY,
a corporation, *Appellee.*

APPELLEE'S BRIEF

Upon Appeal from the District Court of the United States for the District of Idaho Northern Division

CHAS. E. HORNING,
Wallace, Idaho

ROBERT E. BROWN,
Kellogg, Idaho.

Attorneys for Appellee

SUBJECT INDEX

piling concentrates which had theretofore been or which might thereafter be removed from the stockpiles and shipped to other smelters 17, 33, 34, 35

4. The assignment of November 30, 1948, from the Appellant to the Bureau of Federal Supply was never approved or consented to by the Respondent, and did not have the effect of releasing the Appellant from its obligation under the assigned contract to reimburse the Respondent for its expense incurred in stockpiling either the concentrates which had theretofore been or which might thereafter be removed from storage and shipped to other smelters 35, 43

5. Sullivan Mining Company expended $2,500,000.00 in enlarging its smelting plant by adding a fourth electrolytic unit, completing the enlargement in the latter part of 1949, and thus providing sufficient smelting capacity to enable it to process the 48,000 tons of concentrates then remaining in the stockpiles. Sullivan Mining Company then offered to purchase these remaining concentrates from the Government but its offer was ignored and the Government proceeded to remove the concentrates from storage and ship to other smelters 21, 22, 23, 24

6. The Respondent never at any time released the Appellant from its obligations to Respondent under the original contract, as amended on July 12, 1944, and never, expressly or impliedly, agreed to accept the Bureau of Federal Supply as Respondent's debtor ..... 35 to 47

7. Notwithstanding said assignment, the Appellant remained and still remains liable for full reimbursement of the Respondent for all out-of-pocket expenses incurred by Respondent in stockpiling the entire amount of concentrates which were placed in storage by the Respondent, as agent for the Government ..... 35 to 47

TABLE OF AUTHORITIES CITED

TEXT BOOKS

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STATEMENT OF THE CASE

We accept the Appellant's "Statement of the Case" as a correct statement, except that we would change the last sentence in the statement to read as follows:

> It also appears that it was the theory of the Trial Court that the Assignment (Plaintiff's Exhibit No. 22) did not relieve Reconstruction Finance Corporation from liability to reimburse Sullivan Mining Company for its out-of-pocket expenses incurred in stockpiling the concentrates which the Government removed from the stockpiles and shipped and sold to other smelters. (Tr. 16, 17, 18).

SUMMARY OF POINTS IN ARGUMENT

1. The original contract of June 18, 1942, between Metals Reserve Company (Reconstruction Finance Company) and the Respondent, Sullivan Mining Company contemplated that all concentrates which should be stockpiled by Respondent would be sold back to and processed by Respondent at such time or times as Respondent should have sufficient smelter capacity available over and above that required for the processing of its normal intake of concentrates, and it was with this understanding that the Respondent agreed to bear stockpiling expense.

2. The July 12, 1944, amendment of the original contract provided that Appellant should have the right to remove from the stockpiles any part or all of the concentrates and ship and sell the same to other smelters but that in the event of its so doing it would reimburse the Respondent for all out-of-pocket expense incurred by Respondent in stockpiling the concentrates which should be so removed and sold.

3. The Respondent's approval of the Appellant's transfer of the physical custody of the stockpiled concentrates to the Bureau of Federal Supply on November 9, 1948, was

merely an approval of action which the Appellant was authorized to take under the July 12, 1944, amendment of the stockpiling contract, and was not an approval of the subsequent assignment of the underlying contract to the Bureau of Federal Supply and was not a release of the Appellant from its obligation to reimburse the Respondent for its out-of-pocket expense incurred in stockpiling concentrates which had theretofore been or which might thereafter be removed from the stockpiles and shipped to other smelters.

4. The assignment of November 30, 1948, from the Appellant to the Bureau of Federal Supply was never approved or consented to by the Respondent, and did not have the effect of releasing the Appellant from its obligation under the assigned contract to reimburse the Respondent for its expense incurred in stockpiling either the concentrates which had theretofore been or which might thereafter be removed from storage and shipped to other smelters.

5. Sullivan Mining Company expended $2,500,000.00 in enlarging its smelting plant by adding a fourth electrolytic unit, completing the enlargement in the latter part of

1949, and thus providing sufficient smelting capacity to enable it to process the 48,000 tons of concentrates then remaining in the stockpiles. Sullivan Mining Company then offered to purchase these remaining concentrates from the Government but its offer was ignored and the Government proceeded to remove the concentrates from storage and ship the same to other smelters.

6. The Respondent never at any time released the Appellant from its obligations to Respondent under the original contract, as amended on July 12, 1944, and never, expressly or impliedly, agreed to accept the Bureau of Federal Supply as Respondent's debtor.

7. Notwithstanding said assignment, the Appellant remained and still remains liable for full reimbursement of the Respondent for all out-of-pocket expenses incurred by Respondent in stockpiling the entire amount of concentrates which were placed in storage by the Respondent, as agent for the Government.

ARGUMENT

The Appellant concedes that Sullivan Mining Company, as agent for the Reconstruction Finance Corporation, stockpiled 72,263.64 tons of zinc concentrates for the Government (Appellant's Brief, pages 6 and 8) and in so doing actually incurred expenses in the amount of $54,864.10, that being the exact amount for which this suit was brought. Yet strangely, it seems to us, the Government takes the position that under the contract between the Government and the appellee, the appellee is not entitled to any reimbursement whatsoever.

The original contract between the Government and the appellee, dated June 18, 1942, (Exhibit No. 3) and written entirely by a Government agency, was drafted at a time when this Country was at war and needed for the manufacture of munitions of war more lead and zinc than were then being currently produced. The prices of these metals had been such that many operators of low-grade mines had closed down their operations. The purpose of the Premium Price Plan and the purpose of the stockpiling arrangement made with Sullivan Mining Company, and no doubt with other smelter companies, was, by paying premium prices for lead and zinc, to

encourage and make possible the resumption of production of these metals by companies which had theretofore been unable to operate at the theretofore existing metal prices or which on account of the low prices of these metals had curtailed their operations and were not producing up to their full capacity.

The Sullivan Mining Company, the appellee in this case, owned and operated a zinc smelter at or near Kellogg, Idaho. At this smelter concentrates produced from the Star Mine which was owned by Sullivan Mining Company, were processed and, in addition to processing concentrates produced from ore from its Star Mine, said smelter was processing concentrates from ores produced from about fifteen other mine operators. At the time the original contract between the Government and the appellee was entered into, June 18, 1942, the appellee, Sullivan Mining Company, was operating at its then full capacity and was keeping in its own stockpiles a sufficient reserve of zinc concentrates to insure its uninterrupted operation. At the time this original contract was entered into it was fully known to the Government that Sullivan Mining Company's smelter was already operating at its full capacity and that it could not then handle and process more

zinc concentrates than it was currently receiving. The zinc then being produced by the entire country being insufficient to meet the needs of the Government for its armament purposes, the Premium Price Plan was devised. It was then that the Government conceived the idea of having smelter owners throughout the country, such as Sullivan Mining Company, act as agents for the Government to offer to pay and to pay premium prices for zinc of high or low grade which might be domestically produced.

With full knowledge that Sullivan Mining Company was then operating its smelter at full capacity, the Government drafted and submitted to Sullivan Mining Company a contract which provided that Sullivan Mining Company, as agent for the Government, should purchase for the Government and stockpile all zinc concentrates which it might be able to obtain, offering the premium price therefor. Under the provisions of this agreement, Sullivan Mining Company was to stockpile at its own expense all zinc concentrates which it might purchase as agent for the Government, the Government to advance from time to time to Sullivan Mining Company a sufficient amount of money to cover the actual purchase price of the concentrates

purchased by Sullivan Mining Company as agent for the Government and with the understanding, expressed in the contract, that Sullivan Mining Company would have the privilege and the right to re-purchase said zinc concentrates from the Government and to process the same at its smelter as and when it should have smelting capacity available.

Very strangely, and contrary, we think, to any reasonable interpretation of the contract, the Government seems to be taking the position that it was not the intent of the contract that Sullivan Mining Company was to have the right to treat the concentrates which should be so stockpiled, but that Metals Reserve Company would have had the right at any time to remove the concentrates from the stockpiles and to ship them to other smelters for treatment and that the provision in the contract to the effect that the concentrates were to be stockpiled at Sullivan Mining Company's expense was not inserted in the contract with any understanding that the stockpiled concentrates were to be treated by Sullivan Mining Company. If that was not the understanding and the intent of the original contract, then may we ask why Metals Reserve Company, itself, inserted in the contract the following provision:

> "We understand that you desire the material purchased hereunder for our account to be sold to you from time to time as you are able to treat same."

And why was this provision followed by a lengthy paragraph setting out in detail the method by which the value of the concentrates and the amount to be paid therefor by Sullivan Mining Company was to be determined? (Exhibit No. 3).

And if it was not the understanding of both parties and if it was not the intent of the contract that Sullivan Mining Company was to have the right to treat all of the concentrates which should be stockpiled under the terms of the contract, then what reason could there have been for Metals Reserve Company to draft the amended contract of July 12, 1944, (Exhibit No. 6), to provide that Metals Reserve Company should have the right at its sole option to remove all or any part of the concentrates from the stockpiles and ship and sell the same to other smelters? If, as appellant contends, the Metals Reserve Company already had that right under the original contract of June 18, 1942, then certainly it would have been entirely needless to amend that contract in that regard.

The contract of June 18, 1942, originally provided for the stockpiling of not to exceed 1,500 short tons of concentrates per month and not to exceed 10,000 short tons in all. The evidence showed that the Government's Premium Price Plan so thoroughly accomplished its intended purpose that the number of shippers of zinc concentrates to Sullivan Mining Company's Zinc Plant increased from 15 to 45 or 47 (Tr. pages 45-46; 130), and that the quantity of concentrates being tendered to Sullivan Mining Company, over and above the capacity of its smelting plant, so constantly increased that in order to avoid the curtailment of zinc mining the Government from time to time increased the tonnages which Sullivan Mining Company was authorized to purchase and stockpile for the Government's account. (Exhibit No. 9).

Except for the various modifications of the contract increasing the tonnages of concentrates which Sullivan Mining Company was authorized to purchase and stockpile for Metals Reserve Company, the contract of June 18, 1942, remained in its original form until it was amended, as aforesaid, on July 12, 1944, giving Metals Reserve Company the right to remove from the stockpiles and ship to other smelters for treatment all or any

portion of the concentrates purchased and stored by Sullivan Mining Company for the account of Metals Reserve Company.

The July 12, 1944, amendment of the contract (Exhibit No. 6) provided, in its paragraph number "(2)" that:

> "If this company (Reconstruction Finance Corporation) should for any reason remove material from stockpile for any purpose other than for sale to you, you will be reimbursed for actual out-of-pocket expense incurred in connection therewith upon receipt from you of your signed statement reflecting the nature of each item of expense or cost and summarizing the work performed to which the charges apply (i.e. the tonnage removed, weighed and handled)".

With reference to this amendment of the contract Mr. Woolf testified on direct examination (Tr. pages 61-62) as follows:

> Q. Mr. Woolf, just prior to the adjournment at lunch time we had introduced in evidence the modification letter from Metals Reserve Company dated July 12, 1944, as Exhibit No. 6. That modification letter, Exhibit No. 6, has a provision in it differing from the original contract of June 18, 1942, in that it provides that the Metals Reserve Company could remove from the stockpile zinc concentrates for processing. I will ask you whether or not, prior to the letter of modification, July 12, 1944, you had any indication from the Metals Re-

serve Company that all or part of these concentrates might be removed for processing elsewhere?

A. No, we did not.

Q. You were aware at the time this modification was executed that there was a provision for allowing the removal of concentrates by the Metals Reserve Company?

A. In the modification, the modification provided for it?

Q. Yes, in the modification?

A. Yes, Sir.

Q. And there was not a similar provision in the original contract?

A. No.

It was very clear from Mr. Woolf's testimony on cross-examination (Tr. pages 148-153; 160-163) that it was Sullivan Mining Company's understanding that under the original contract of June 18, 1942, Sullivan Mining Company was to treat all of the concentrates which should be stockpiled by it under the provisions of that contract and that by reason thereof the concentrates were to be stockpiled at Sullivan Mining Company's expense. It is also clear from Mr. Woolf's testimony on both direct and cross-examination that it was Sullivan Mining Company's understanding that under the amendment of July 12, 1944, Sullivan Mining Company was

to pay the expense of stockpiling all concentrates which should thereafter be treated by Sullivan Mining Company and that Sullivan Mining Company was to be reimbursed for all expenses incurred by it in stockpiling any and all concentrates which might be removed by the Government and shipped to other smelters for treatment. (Tr. pages 160-164). (Exhibits Nos. 23, 24, 25).

There is nothing in the evidence which would indicate or even suggest that there was any different understanding upon the part of the Government at the time the June 18, 1942, contract was drafted or at the time the amendment of July 12, 1944 was drafted. We are willing to concede that both the original contract and the amendment thereof could and should have been made more definite and certain but it is inconceivable to us that either the original contract or the amendment thereof would have been drafted by the Government with the deliberate intention of making either of them so indefinite and uncertain that the Government could later place an interpretation upon these contracts which would be contrary to the understanding of the parties at the time the contracts were executed.

We would be reluctant to believe that at

the time the Government's draftsmen who inserted in the amended contract the paragraph which we have quoted from Exhibit No. 6 intended to trick the Sullivan Mining Company into an agreement with a hidden meaning to the effect that if these concentrates should be removed from the stockpiles and not processed by Sullivan Mining Company, Sullivan Mining Company would be entitled to no reimbursement whatsoever for the expenses which they had incurred in stockpiling the concentrates but would be entitled only to reimbursement for expenses which Sullivan Mining Company might incur in loading out the concentrates for shipment to some other smelter that would make the only profit to be made in processing the concentrates and reducing them to metallic form. It would require an unrealistic stretch of imagination to conceive of Sullivan Mining Company's entering into either the original contract of June 18, 1942, or the amendment of July 12, 1944, not only with no thought of some profit to itself, but with not even any assurance that, without any profits to itself, it would have no right to reimbursement for its actual out-of-pocket expenses in stockpiling these concentrates in the subsequent treatment of which its competitors might

make the entire profit and it would be only by a like stretch of imagination that anyone could conceive of the United States having even the faintest thought of asking the Sullivan Mining Company to do any such thing.

The Government's stockpiling program was terminated on June 30, 1947, and no concentrates were stockpiled for the Government after that date.

No portion of these concentrates was withdrawn from the stockpiles for processing by Sullivan Mining Company. Under its contract with the Government, Sullivan Mining Company was required to operate its smelter "at the highest possible rate and to maintain in stockpile at all times not less than 10,000 short tons of zinc concentrates or a quantity thereof equivalent to six weeks' supply" for its own account. The contract (Exhibit No. 3) provided in effect that Sullivan Mining Company was not expected to process any of the Government's concentrates until such time or times as Sullivan Mining Company's own stockpile should contain less than the minimum of 10,000 tons. The idea back of the whole stockpiling program and the Premium Price Plan was to increase the mining of zinc ores and to keep the zinc smelters running at full capacity. So long as the Govern-

ment got the metallic zinc which it needed it was of no importance whether the zinc came out of the Government's stockpiles or whether it came out of the stockpiles which the smelters maintained for their own account.

The evidence in this case showed that Sullivan Mining Company made every possible effort to keep its smelting plant running at full capacity, and that at times it endeavored to overcome the labor shortage by employing women on manual labor jobs, and by employing Italian internees, and coal miners who had been released from the army to work in the metal mines. (Tr. 65-66).

It was not until after the termination of the stockpiling program that the Government indicated that it was considering shipping to other smelters the concentrates which had been stockpiled by Sullivan Mining Company for the Government. (Exhibit No. 11 — a letter from the Reconstruction Finance Corporation, dated February 19, 1948). In Sullivan Mining Company's reply to that letter, as well as in subsequent letters to the Reconstruction Finance Corporation, Sullivan Mining Company insisted that under its contract with the Government it was entitled to reimbursement for the expense which it had incurred in constructing and maintain-

ing the storage bins in which the Government's concentrates were stockpiled and for the expense which had been incurred in unloading the concentrates from the railroad cars or trucks into the bins. (Exhibits 13, 17, 23; Tr. 160, 161, 163, 164).

On October 22, 1948, the Reconstruction Finance Corporation advised Sullivan Mining Company that Reconstruction Finance Corporation was turning the physical custody of its remaining stockpiled concentrates over to the Bureau of Federal Supply, effective at the end of business on October 31, 1948. (Exhibit No. 17). Mr. Woolf replied to that letter and again insisted that Sullivan Mining Company be reimbursed for its out-of-pocket expenses incurred in stockpiling the concentrates (Exhibit No. 17).

The date on which the physical custody of the remaining concentrates was transferred to the Bureau of Federal Supply was subsequently set up to December 1, 1948. (Exhibit No. 18).

On February 3, 1949, the Bureau of Federal Supply wrote Sullivan Mining Company, enclosing three copies of a proposed new contract covering the handling of the concentrates which still remained in the stockpiles.

(Exhibit No. 21). Paragraph 6 of this proposed contract reads as follows:

> "There shall be no charge to the Government for storage. However, if the concentrates are ordered shipped to another location, the Government will reimburse the Contractor at the rate of 85c per ton for unloading and handling inbound to the storage site including the furnishing of weight certificates and 60c per ton for the handling, loading and weighing same outbound from the storage site in accordance with good commercial practice."

As a part of Exhibit No. 23 there is a letter from Sullivan Mining Company to the Bureau of Federal Supply, acknowledging receipt of the three copies of the proposed new contract. One paragraph of this letter reads as follows:

> "It is our interpretation of this contract that the Government is willing to reimburse us for the in-handling which was incurred on such material and which has recently been shipped out and that we presume that this applies not only to the material that will be shipped out from now on but also to the material that was shipped out from the stockpile during 1948."

In reply to this the Bureau of Federal Supply wrote Sullivan on March 15, 1949:

> "In reference to paragraph number 2 of your letter the interpretation is correct, except that all charges incident to storage

and handling of this material in and out of storage on and after December 1, 1948, are for the account of Bureau of Federal Supply." (Exhibit No. 23).

Answering this, Sullivan wrote the Bureau of Federal Supply on March 24, 1949:

"With reference to paragraph 2 of your letter, we incurred charges incident to storage and handling of this material prior to December 1, 1948, as well as after December 1, 1948. When the Bureau of Federal Supply took over the assets of the Reconstruction Finance Corporation it also took over its liabilities and obligations. By the statement referred to in your letter you have agreed on the principle but applying it only after December 1, 1948. This same principle should apply also for the expenses incurred by this company prior to December 1, 1948." (Exhibit No. 23).

There appears to have been no further correspondence upon this subject until the Bureau of Federal Supply wrote Sullivan Mining Company on June 23, 1949, (Exhibit No. 24) as follows:

"Reference is made to your letter of March 24, 1949, relative to storage and handling charges under the subject contract.

"It is the intent of the contract that you will be paid for unloading and handling inbound, and handling, loading and weighing outbound, in accordance with the terms and conditions of the contract, for all ma-

terials to be shipped to another location on or after December 1, 1948.

"The subject of liability for such charges for material which was shipped out prior to December 1, 1948, is still a matter of dispute between the Reconstruction Finance Corporation and this Bureau. It is anticipated that a settlement will be reached in the near future, and you will be promptly advised as to the Government Agency liable for such claims."

Then on August 9, 1949, the Bureau of Federal Supply again wrote Sullivan Mining Company (Exhibit No. 24):

"By letter dated June 23, 1949, you were advised that the subject of liability for charges for material shipped out prior to December 1, 1948, was a matter of discussion between this Bureau and the Reconstruction Finance Corporation.

"*All questions arising out of such discussions have now been settled and it has been determined that, as expressed in previous letters, this Bureau will not be liable for charges for material shipped to another location prior to December* 1, 1948. *Claims representing any such charges are properly for consideration by the Reconstruction Finance Corporation and the contract which has been forwarded to you is designed to cover contractual relationships between your company and the Bureau of Federal Supply from the period beginning December* 1, 1948. (Emphasis, ours).

"It is hoped that in the light of the above information you will see your way clear to

executing the contracts previously mailed to you. If such is the case, the procedure outlined in our letter dated February 3, 1949, should be followed in the execution thereof."

On August 25, 1949, Sullivan Mining Company wrote to the Bureau of Federal Supply, in part as follows (Exhibit No. 25):

"This is written in answer to your letter of August 9, 1949, concerning contract SCM-TS-12755. Reference is also made to your letter of February 3, 1949, enclosing copies of this contract and other correspondence on this subject.

"In our original agreement with Metals Reserve Company of June 18, 1942, and subsequent renewals of this agreement we undertook to purchase for the account of Metals Reserve Company zinc concentrates tendered to us in excess of our processing capacity and to stockpile them. The same contract provided for our repurchasing all or part of this material from time to time as we were able to treat same. It was with this commitment that we agreed to provide storage and to stockpile at our expense.

"We offered through Mr. Charles M. Ince, Manager of Metal Sales of the St. Joseph Lead Company, to commence treatment of the remaining stored concentrates, approximately 48,000 tons. Our offer was in conformity with the purchase provision as set forth in the agreement of June 18, 1942; in fact, we made a better offer to you than the one so provided because we agreed to deliver to you 85% of the con-

tained zinc as compared to the payment of 80% of the zinc content as our present zinc concentrate purchase schedules and contracts provide. Notwithstanding this we are now advised by Mr. Ince that our offer was rejected by you although as yet we have had no direct advice from you to this effect. We respectfully request that we have your formal advice on this matter.

"Under the conditions above stated we therefore do not feel in a position to execute the contract as far as it pertains to the loading and shipment of your concentrates."

No denial was made of the fact that such an offer was made by Sullivan Mining Company through Mr. Ince. If no such offer was made, certainly the Government would have replied to Sullivan Mining Company's letter of August 25, 1949, and would in such reply have denied that such an offer was made. But the evidence showed that the Government made no reply of any kind to this letter. (Tr. 112).

In their brief Counsel for Appellant complain that the District Court erred in admitting in evidence Exhibit No. 25 over Appellant's objection that this Exhibit was hearsay and a self-serving declaration.

Exhibit No. 25 was a copy of a letter written by Sullivan Mining Company to the Gov-

ernment and its receipt by the Government was not denied and neither was it denied that the letter was never answered. We submit that this letter itself constituted an offer by Sullivan Mining Company to purchase the 48,000 tons of concentrates which then remained in storage regardless of whether Mr. Ince ever did make the offer on behalf of Sullivan Mining Company.

The fact that the Government declined Sullivan Mining Company's offer to purchase and treat the concentrates that then remained in stockpile is evidenced by the fact that the Government went right ahead and removed the balance of the concentrates and shipped them elsewhere for processing. (Tr. pages 117, 118).

The reason why Sullivan Mining Company would have been able on or after August 25, 1949, to process the Government's concentrates which then remained in stockpile appears from Mr. Woolf's testimony (Tr. page 117):

> Q. Mr. Woolf, earlier in your testimony and in one of the exhibits, it became apparent that Reconstruction Finance Corporation had in 1946 requested you to process a portion of the stockpiles and at that time you had not had adequate facilities and you gave certain reasons in your testi-

mony, I believe, with respect to manpower and, in fact, you, at one time, had to shut down one of the units, I believe. At the time that you offered to purchase the remaining part of the stockpile in 1949, as evidenced in Exhibit No. 25, had there been some change in your condition or your facilities?

A. Yes, as I testified earlier, our zinc plant in those earlier years consisted of three electrolytic units. In the years subsequent to that we added an additional fourth electrolytic unit with necessary auxiliary enlargement of the remaining parts of the plant so that late in 1949 we had four units and the plant was correspondingly enlarged. The cost of that unit, the fourth unit, was somewhere in the range of two and a half million dollars.

Q. Did that put you in a position to handle these concentrates at the time this offer was made?

A. Yes.

On February 17, 1950, Mr. Woolf, Superintendent of Sullivan Mining Company's zinc smelter, and Mr. J. B. Haffner, General Manager of the smelter, attended two conferences in Washington in an endeavor to settle Sullivan Mining Company's claim which is the subject matter of the present suit. One of these conferences was in the offices of the Bureau of Federal Supply and the other conference was in the offices of the Reconstruc-

tion Finance Corporation. (Tr. pages 168-169). Mr. Woolf testified that at the earlier of these two conferences he and Mr. Haffner were advised by the Bureau of Federal Supply that that Bureau would be willing to pay the expense incurred by Sullivan Mining Company in stockpiling all of the concentrates which were removed from the stockpiles and shipped out subsequent to December 1, 1948. At this conference the Bureau of Federal Supply requested Mr. Woolf to prepare an itemized statement of Sullivan Mining Company's entire claim. Having been assured by the Bureau of Federal Supply that that Bureau would be willing to pay the portion of the expense which we have already mentioned, Mr. Haffner and Mr. Woolf went to the offices of the Reconstruction Finance Corporation for the second of the two conferences. Their purpose in conferring with the Reconstruction Finance Corporation was to inquire whether that agency would be willing to pay the balance of Sullivan Mining Company's claim over and above the portion of the claim which the Bureau of Federal Supply had indicated their willingness to pay. The total amount of Sullivan Mining Company's claim, being the amount for which this suit was brought, was discussed at both conferences. Mr. Woolf testified that following

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the conference with the Bureau of Federal Supply "we went to the Reconstruction Finance Corporation office and there we were rebuffed for their portion and were told that they would not pay." (Tr. pages 168-169).

Upon Mr. Woolf's return home he wrote a letter dated March 4, 1950, (Exhibit No. 28) to the Bureau of Federal Supply in which he reviewed certain correspondence which had passed between Sullivan Mining Company and the Bureau of Federal Supply and in which he enclosed an itemized statement of Sullivan Mining Company's entire claim, this being the statement which at his conference with the Bureau of Federal Supply he had been requested to submit. On March 1, 1950, and without waiting for the statement which Mr. Woolf had been requested to submit and contrary to the offer of the Bureau of Federal Supply to pay a portion of Sullivan Mining Company's claim, a J. E. Salisbury who represented himself to be Chief of the Storage and Transportation Division, General Services Administration, Federal Supply Service, Strategic and Critical Materials Branch, wrote a letter to Sullivan Mining Company (Exhibit No. 29) in which, after referring to Mr. Woolf's and Mr. Haffner's conferences in Washington on February 17, 1950, he said:

"After thorough examination and review, it is our considered opinion that there is no liability on our part under the contract in regard to unloading expenses. We base this opinion on the following:

(1) The original contract provided that your company should bear the expense of stockpiling.

(2) The Amendment of July 12, 1944, limited reimbursement in the event the concentrates were shipped elsewhere to the cost of removal."

It is true, as stated in Mr. Salisbury's letter, that the original contract of June 18, 1942, provided that Sullivan Mining Company should bear the expense of stockpiling and that Sullivan Mining Company agreed so to do, expecting that it would process the concentrates at its own smelter.

But we submit that it is not true that the amended contract of July 12, 1944, limited Sullivan Mining Company's reimbursement to expenses which it might incur in connection with the removal of the concentrates from the stockpiles for shipment to other smelters.

The amended contract (Exhibit No. 6) provided for two different bases for settlement between the Government and Sullivan Mining Company — one with respect to concentrates which should be sold back to Sul-

livan Mining Company, and the other with respect to concentrates which should be removed from the stockpiles for shipment and sale to other smelters.

Paragraph (1) of the amended contract provided that:

> "In the event of any sale of such material to you, the inbound weights and assays as agreed upon between you and the producer of the material at the time of your purchase thereof for this Company's account shall govern in settlement with this Company."

In other words, if any of the concentrates were to be sold to Sullivan Mining Company, then Sullivan Mining Company would, as provided in the original contract, bear the cost of stockpiling the material which should be sold to it just as if it had purchased and stockpiled such concentrates for its own account in the first place and the settlement with the Government would be based entirely upon weights and assays and prevailing market prices and would not involve any stockpiling costs.

But the settlement was to be otherwise with respect to concentrates which should be removed from the stockpiles for sale to other parties. This was covered by paragraph (2)

of the amended contract which provided that:

> "If this Company should for any reason remove material from stockpile for any purpose other than for sale to you, you will be reimbursed for actual out-of-pocket expense incurred in connection therewith upon receipt from you of your signed statement reflecting the nature of each item of expense or cost and summarizing the work performed to which the charges apply (i. e. the tonnage removed, weighed and handled)."

We submit that any fair and sensible interpretation of this provision would necessarily be that if any of the material in the stockpiles should be removed for sale to other smelters, the Sullivan Mining Company was to be reimbursed for its "*actual out-of-pocket expenses incurred in connection therewith*" which would include its cost of stockpiling, but that its reimbursement was to be limited to expense incurred in connection with the material which should be removed and not sold to Sullivan Mining Company.

And what reason could there have been for Sullivan Mining Company to expend out of its own pocket the sum of $54,864.10, or any other amount, in constructing bins and stockpiling concentrates to be processed by other smelters, and under a contract which, as the Government now contends, provided

that Sullivan Mining Company would be entitled to no reimbursement for this expenditure?

Counsel for Appellant has found in Words & Phrases that the word "*therewith*" means "*with that or this.*" But we submit that as the word "therewith" is used in paragraph (2) of the amended agreement it was not intended to and could not have any such meaning. That would have been no meaning at all.

And may we ask *when* the Government decided that the amendment of July 12, 1944, "limited reimbursement in the event the concentrates were shipped elsewhere to the cost of removal"? If that was the intent of the agreement on March 1, 1950, when Mr. Salisbury wrote his above mentioned letter to Sullivan Mining Company (Exhibit No. 29), then that must have been the intent of the agreement on June 23, 1949, when the Bureau of Federal Supply wrote the letter to Sullivan Mining Company (Exhibit No. 24) in which Sullivan was advised that—

> "*The subject of liability for such charges for material which was shipped out prior to December* 1, 1948, *is still a matter of dispute between the Reconstruction Finance Corporation and this Bureau. It is anticipated that a settlement will be reached in the near future, and you will be*

promptly advised as to the Government Agency liable for such claims." (The reference in this paragraph being to Sullivan Mining Company's claim for reimbursement for stockpiling expenses).

And if at that time the intent of the agreement was that Sullivan Mining Company was not entitled to any reimbursement for stockpiling these concentrates why would it have been a matter of dispute between the Bureau of Federal Supply and the Reconstruction Finance Corporation as to which of these two governmental agencies was liable for the reimbursement of Sullivan Mining Company for its stockpiling expense? And if on March 1, 1950, when Exhibit No. 29 was written the intent of the agreement was that Sullivan Mining Company was not entitled to reimbursement for any of the expenses incurred by it in stockpiling these concentrates that must have been the intent of the agreement on August 9, 1949, when the Bureau of Federal Supply wrote Sullivan Mining Company (Exhibit No. 24) advising Sullivan Mining Company that the aforesaid dispute between the Bureau of Federal Supply and the Reconstruction Finance Corporation had been settled and that it had been determined by these two agencies that Sullivan Mining Company's claim was against the Reconstruc-

tion Finance Corporation for expenses incurred by Sullivan Mining Company in stockpiling all concentrates which were removed from the stockpiles prior to December 1, 1948.

And if it was the intent of the amendment that Sullivan Mining Company was not entitled to any reimbursement for expenses incurred by it in stockpiling these concentrates, may we ask why the Government did not take that position at the Government's conferences with Mr. Woolf and Mr. Haffner in Washington on February 17, 1950?

It appears from Mr. Salisbury's letter of March 1, 1950, to Sullivan Mining Company (Exhibit No. 29) that one of the above mentioned conferences was held in Mr. Salisbury's office. It seems strange that he not only did not at that conference place the interpretation on the amended agreement that he placed on it in his letter of March 1, 1950, but that he asked Mr. Woolf to send him an itemized statement of Sullivan Mining Company's entire claim.

We submit that the interpretation which Mr. Salisbury in his letter of March 1, 1950, placed on the amended agreement was an after-thought.

If, as we contend, the amended contract of July 12, 1944, between the appellant, Reconstruction Finance Corporation, and the appellee, Sullivan Mining Company, obligated the appellant to reimburse appellee for the latter's expense incurred in stockpiling all concentrates which appellant should thereafter remove from the stockpiles and ship to other smelters, then this obligation remained the obligation of the appellant notwithstanding the assignment of the contract to the Bureau of Federal Supply.

Let us not confuse the transfer of the physical custody of the stockpiled concentrates from appellant to the Bureau of Federal Supply (Plaintiff's Exhibit No. 18; Defendant's Exhibit No. 35 — a letter dated November 9, 1948, from the appellant to appellee) with the subsequent assignment of the underlying contract to the Bureau of Federal Supply. This letter was not and did not purport to be an assignment of the contract. It was captioned "Re: Transfer of Physical Custody of RFC Stockpiles — Zinc Concentrates to Bureau of Federal Supply," and the body of the letter conformed with its caption. The appellant having the right under the July 12, 1944, amendment to sell the concentrates and to transfer the physical

custody thereof to any third party to whom it might wish to sell the same, the letter of November 9, 1948, (Exhibits 18 and 35) might just as well have advised the appellee that the physical custody of the concentrates was being transferred to Anaconda Copper Mining Company and that the appellee should bill the latter company for all "charges incurred in connection with this material." If such had been the case, would Counsel for appellant contend that the effect of the letter was to release the appellant from its obligation to reimburse the appellee for its stockpiling expense and to substitute, as its debtor, the Anaconda Copper Mining Company? Or that if the appellee, assenting to such arrangement, had thereafter billed the Anaconda Copper Mining Company for appellee's stockpiling expense and payment had been refused, the appellee would have had recourse against the Anaconda Copper Mining Company and no recourse against the appellant? In order to sustain the argument found on pages 41 and 42 of appellant's brief both of these questions would have to be answered in the affirmative.

The letter of November 9, 1948, from appellant to appellee advised the appellee that appellant's "legal division is *arranging to as-*

sign the underlying contract involved in this storage operation." That made it clear that said letter was not intended as an assignment and that the appellee's approval of the *transfer of the physical custody* of the stockpiled concentrates to the Bureau of Federal Supply was not the approval of a not-yet-drafted assignment of the underlying contract.

The assignment, thereafter drafted by the appellant itself without any consultation with the appellee, was a conditional assignment—conditioned upon the assignee's "*assuming all duties and obligations*" of the assignor under its contract with the appellee.

Counsel for appellant are contending that the mere execution of this assignment by appellant and the acceptance of it by the Bureau of Federal Supply constituted a release of the appellant from its obligations to the appellee under the assigned contract even though the appellee itself not only never approved nor consented to the assignment but was never requested so to do. (Tr. 180).

We submit that the appellant's contention that a *novation* occurred is entirely without merit. We are very willing to accept the rule which Counsel for appellant have quoted from 4 *American Jurisprudence, Page* 233:

> "At the outset it should be noted that a party to a contract may not assign an obligation so as to avoid liability thereon and shift liability to the assignee; only rights under a contract can be assigned. It is otherwise, of course, *where the assignee assumes the obligation of the assignor with the consent of the other party to the contract and the latter releases the assignor from further liability*; in such case there is a novation." (Emphasis supplied).

A clear statement of the novation rule is found in *Colley v. Chowchilla*, a California case reported in 255 Pac., 188, 192:

> "An essential element of every novation is a new contract to which all the parties concerned agree**** It is essential, then, in order to constitute a novation by which the original debtor is released, the creditor being bound thereby to discharge the debt as to him and look to another for the payment of his demand, that a contract be made between the new debtor and the creditor by which the claim can be enforced against such new debtor; and if the new debtor enters into no contract with the creditor by which he becomes the debtor of the creditor, so that the creditor may maintain an action against him, there is not a novation."

In this same case the court goes on to say:

> "The most frequent novation is the substitution of a new debtor. To constitute this kind of a novation, there must be a mutual agreement among three parties,

the creditor, his immediate debtor, and the intended new debtor, by which the liability of the last named is accepted in the place of the original debtor in discharge of the original debt.**** The burden of proof rests upon him who asserts that there has been a novation to establish it."

Perhaps a still more concise statement of the novation rule is that found in 39 *American Jurisprudence*, at *Pages* 264 *and* 265:

"The effect of a novation by the substitution of a new debtor is to extinguish the liability of the original debtor. For obvious reasons the mere assumption of the debt by the new debtor cannot have this effect. It is not within the power of the original debtor to release himself from liability by contracting for the assumption of the debt by another. There can therefore be no doubt that in order to effect a novation by the substitution of a new debtor, the assent of the creditor to the substitution is essential. A contract should be made between the new debtor and the creditor by which the claim can be enforced against the former. The assent of the creditor, however, need not be established directly, but may be inferred from the circumstances surrounding the transaction and from the subsequent conduct of the parties. However, mere knowledge of and consent by the creditor to the assumption, in whole or in part, by another of his debtor's obligation to him will not, standing alone, create a novation so as to release the original debtor, without an additional agreement and consent on the part of the

creditor that the arrangement be given that effect. Thus, mere acceptance by a creditor of a certified check from his debtor does not constitute a novation, for there is no substitution of one debtor for another; the delivery of the check being simply a conditional payment, and the release of the original debtor being dependent on the condition that the check should be honored on presentation, he still remains the debtor, for he is bound for the debt as long as the check remains unpaid. Furthermore, consent is not to be implied merely from the performance of the contract by the substitute, for that might well consist with the continued liability of the original party, the substitute acting for that purpose in the capacity of agent for the original obligor. On the other hand, creditors cannot be forced to submit to a change of debtors."

A case which fully supports our contention that the appellee did not intend to release, and did not release the appellant from its obligation to the appellee is *City National Bank of Huron, South Dakota, et al. v. B. R. Fuller*, 52 *Fed.* (2d) 870, 79 A.L.R. 71, decided by the U. S. Circuit Court of Appeals, Eighth Circuit. In that case so many decisions of other courts upon the question of novation are assembled and discussed that it seems almost needless to cite any other authorities. The following are quotations from the court's opinion:

"The theory of novation is expressed by Professor Williston in his work on Contracts, vol. 1, p. 681, as follows: 'To work a novation it is not enough that a promise has been made to the original debtor to pay the debt; nor does the assent of the creditor help the matter unless an offer was made to him. The theory of novation is that the new debtor contracts with the old debtor that he will pay the debt, and also to the same effect with the creditor, while the latter agrees to accept the new debtor for the old. A novation is not made by showing that the substituted debtor agreed to pay the debt. It must appear that he agreed with the creditor to do so. Moreover, this agreement must be based on the consideration of the creditor's agreement to look to the new debtor instead of the old. The creditor's assent to hold the new debtor liable is therefore immaterial unless there is assent to give up the original debtor.'"

* * *

"In Walker v. Wood et al., 170 Ill. 463, 48 N.E. 919, 920, the court said 'The assent or agreement may be either express or implied, but neither knowledge of the arrangement between the corporation and the firm, nor the partial payment of the debt, nor a demand for the payment, like the filing of the claim against the corporation, nor all combined, necessarily establish such assent or agreement as a legal conclusion.'"

* * *

"The cases establish the following propositions:

"(a) The mere assumption of a debt by a third party is not sufficient to constitute a novation." (Citing cases).

"(b) There is no novation, unless there is an intent to relinquish the original claim and the original debtor.

"In Leckie v. Bennett et al., 160 Mo. App. 145, 141 S.W. 706, the court said at page 710: 'A creditor may, without releasing his original debtor, take advantage of the agreement of a third person to pay the debt, in consideration of a transfer of property to him by such original debtor. The original debtor in such case need not be discharged, and may still be held liable for the debt.

"(c) All parties must agree to the substitution of the new debt and debtor. The creditor is under no obligation to accept a new debtor. (Citing cases).

"(d) The intent of the creditor to look to the new debtor is not in itself a release of the old debtor, unless clear from all the circumstances that it was so intended, and the creditor may have a remedy against both old and new debtors. (Citing cases).

"On this subject we quote from 1 Williston on Contracts, sec. 393, p. 736: 'Diversity of opinion likewise prevails in regard to the right of a creditor whose debtor has received a promise to pay the debt, to sue both the new promisor and the original debtor. Courts which hold that the original contract is in effect an offer of novation to the creditor naturally hold that if the creditor accepts the promisor as his debtor he releases the original debtor, and

> on the other hand if he elects to sue the original debtor he thereby rejects the proffered novation and cannot afterwards sue the new promisor. The more common doctrine, however, allows the creditor a right against the original debtor and the new promisor.' "

Another case which supports our position that the appellant's assignment of the stockpiling contract to the Bureau of Federal Supply did not release the appellant from its obligations to the appellee under said contract is *Walker v. Mills,* 78 Pac. (2d), 697 from which we quote the following language of the court which is found on page 699 of the opinion:

> "It is stated as a general rule that 'a party to a contract may not, unless authorized by the other party, either in the contract itself or otherwise, so assign the contract as to escape liability for the performance of the acts or duties imposed upon him by its terms,' but the assignor remains liable to the other party for the proper performance by his assignee."

In the case of *Southern Pac. Co. v. Butterfield et al,* 154 Pac., 932, it was held that where land was sold under contract providing that the agreement should bind the successors, heirs and assigns of the parties, an assignee of the purchasers, who was not a party to the contract was not liable to the

vendor for the unpaid balance of the purchase price; that the promise of the purchaser of the land to pay therefor could be enforced against the purchaser who signed the contract but could not be enforced against his assignee because the assignment had not brought together the seller and the purchaser's assignee and by reason thereof there had not been a meeting of the minds essential to the formation of a contract between the seller and the assignee of the original purchaser.

Another case to which we would call the Court's attention is *Harrison et al v. Fregger et al*, 294 Pac., 372, from which we quote as follows:

> "The distinction between novation and assignment is clear; in novation the obligation between the original parties to the contract is completely extinguished, and a new obligation between the transferee and obligor is created and substituted for the previous one; while, after assignment, the obligation of the original debtor may continue to rest upon him, and he may be compelled to respond in the event of the default of the assignee. 46 C. J. 576; 5 C. J. 977.
>
> "In order to effect a novation there must be a clear and definite intention on the part of all concerned that such is the purpose of the agreement, for it is a well-settled principle that novation is never to be presumed;*** the point in every case, then,

is, did the parties intend by their arrangement to extinguish the old debt or obligation and rely entirely on the new, or did they intend to keep the old alive and merely accept the new as further security, and this question of intention must be decided from all of the circumstances. The existence of such an intention may, of course, be found although there is nothing positive in the agreement." 20 R. C. L. 366. See, also McAllister v. McDonald, above.

"Here we have merely an assignment, and there is nothing in the subsequent acts of the lessors in accepting rent from the assignee and thereafter permitting it to sublease the premises — it still being looked to for the rent — inconsistent with the intention on the part of the lessors to continue to look to Fregger for the rent in the event of the default of his assignee."

In the case of *Potts v. Burkett*, 278 S. W., 471, the court held that:

"The agreement between the parties that a contract may be assigned will not of itself release the party assigning it, unless from the circumstances an agreement, either express or implied, is to be inferred that such release was intended."

We have shown, and the record bears us out in this:

1. That the assignment from the appellant to the Bureau of Federal Supply was never expressly approved nor consented to by the appellee. (Tr. 180).

2. That the appellee never at any time expressly agreed with the appellant that the appellee would release the appellant from its obligations to the appellee under the assigned contract and would look entirely to the appellant's assignee for the fulfillment of those obligations.

3. That there was never any privity between the appellee and the appellant's assignee and never any agreement between them under which said assignee agreed to assume and to fulfill the appellant's obligation to reimburse the appellee for its cost of stockpiling the concentrates which had theretofore been or those which might thereafter be removed from storage for sale to other smelters.

Now let us see whether this showing can be overcome by implications arising from the appellee's conduct.

When appellant first advised appellee that appellant proposed to remove the stockpiled concentrates from storage and ship the same to other smelters, the appellee insisted upon being reimbursed for its stockpiling costs. (Tr. page 73; Exhibit No. 11 — a letter from appellee to appellant, dated March 11, 1948). Here we would call attention to the word "not" in the tenth line from the foot of page 73 of the Transcript. This word should be "now."

Again on May 10, 1948, Sullivan, in an-

other letter to the appellant again insisted upon reimbursement for its stockpiling costs (Exhibit No. 13; Tr. pages 77-78).

After the appellant had removed a considerable amount of concentrates from the stockpiles and shipped the same to other smelters, and immediately upon the appellee's being advised that appellant proposed to transfer the physical custody of the remaining concentrates to the Bureau of Federal Supply, the appellee by letter dated October 27, 1948, again insisted upon its being reimbursed for its stockpiling costs. (Exhibit 17, Tr. page 91).

Without the appellee's having receded from its position that it was entitled to reimbursement for its cost of stockpiling all concentrates which had been removed from storage by the appellant as well as for its cost of stockpiling all concentrates which should thereafter be removed from storage for sale to other parties, the appellant assigned to the Bureau of Federal Supply the contract under which said concentrates had been stockpiled. The assignment was dated November 30, 1948.

On February 3, 1949, and before any additional concentrates had been removed from

the stockpiles the Bureau of Federal Supply, presumably recognizing the fact that the appellee had not approved nor consented to said assignment, and certainly knowing that up to that time no contract had been entered into between the Bureau of Federal Supply and the appellee, drafted and submitted to the appellee a proposed contract which, if it had been executed by the appellee, would have replaced the old contract between the appellee and the appellant. But the appellee refused to execute, and never did execute this proposed contract (Exhibit No. 21) for the reason that, as interpreted by the Bureau of Federal Supply, it made no provision for appellee's reimbursement for *all* of its stockpiling expense, and for the reason that in subsequent correspondence the Bureau of Federal Supply declined to assume all obligations of the appellant under the original stockpiling agreement, as amended on July 12, 1944.

There is certainly nothing in all this which would give rise to any implication that the appellee agreed to release the appellant from its obligations under the old contract and to look to the Bureau of Federal Supply for appellee's reimbursement.

And the fact that thereafter the Bureau

of Federal Supply finally denied that there ever existed any obligation upon the appellant's part to reimburse the appellee for any of its stockpiling costs would certainly conclusively indicate that there was never any bona fide assumption of those costs by the Bureau of Federal Supply and that there was never any *novation*, as appellant now contends.

We respectfully submit that the judgment of the District Court should be affirmed.

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